Building a Sustainable Future

Proposed Changes to Manitoba's Environment Act

A Discussion Paper

September 2001

Protecting & Managing *our Future*

Manitoba Conservation

This document has been prepared to provide opportunity for the public to participate in the preparation of the amendments to the Environment Act that are required to implement the recommendations of the report on the Consultation on the Implementation of Sustainable Development (COSDI).

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DISCUSSION PAPER

2001 PROPOSED ENVIRONMENT ACT AMENDMENTS

Background

On June 29, 2000 the government of Manitoba announced its new multi-component sustainable development strategy. The strategy included: the acceptance and implementation of the recommendations in the Report on the Consultation on Sustainable Development Implementation (COSDI); the formation of an Environmental Stewardship Division in the newly constituted Conservation Department; the re-establishment of the Manitoba Round Table; the creation of an Aboriginal Resources Council; and the initiation of a comprehensive planning process on the east side of Lake Winnipeg.

COSDI was a multi-stakeholder consultation process initiated in the fall of 1997. The initiative was to develop recommendations on how best to implement the principles and guidelines of sustainable development in land use planning and environmental decision-making. The process lasted approximately 18 months and included regular deliberations by an eighteen-member "Core Group" made up of individuals of varied backgrounds, experience and expertise. The core group sought the advice of a sixty-member advisory committee comprised of representatives of different organizations and interests. The COSDI report was submitted to government in May 1999.

The report recommended Manitoba:

- develop, adopt and implement province-wide sustainable development policies;
- review the existing sustainable development strategies to ensure they provide an integrated, comprehensive, understandable and current framework for implementing sustainable development;
- require integrated sustainable development planning on a large area basis;
- require all municipalities to review or prepare development plans that reflect the components of sustainable development;
- broaden the current environmental impact assessment to an effects assessment, which includes review of all sustainability factors, and which could encourage and recognize planning and pre-licensing activities;
- provide opportunity for public participation and consultation at all levels of planning, significant resource allocation and effects assessment and review;
- ensure environmental, resource and land-use decision-making adhere to interprovincial, national and international obligations;
- work in partnership with Aboriginal peoples to develop a consultation strategy to ensure their involvement in resource use and allocation, environmental licensing and regulatory mechanisms; and
- establish a Sustainable Development Auditor to monitor and report publicly on the implementation of sustainable development within the provincial government.

The broad scope of the recommendations contained in the COSDI Report will require legislative amendments to *The Environment Act*, *The Planning Act*, *The City of Winnipeg Act* and several resource management acts. This paper outlines amendments being proposed to *The Environment Act*.

The Environment Act has been the mainstay of Manitoba's environmental protection legislation since 1988. There have been amendments throughout the years, however the scheme of the act, and its major provisions, have remained intact. The current suite of proposed amendments reflects: a) changes required to implement specific recommendations contained in the COSDI Report; b) new ideas that should enhance the decision-making processes and that are consistent with the spirit of COSDI; and c) administrative changes required for improving the performance of the legislation.

A) Amendments to implement the recommendations in the COSDI Report

1. Effects Assessment (EA)

Currently, *The Environment Act* requires an environmental assessment of any proposed development that is listed in the Classes of Development regulation. The process causes the review and assessment of the environmental impacts of the proposed development, the process culminates in the granting (or refusing) of an environmental licence, setting out the terms and conditions within which the development may proceed. The EA process attempts to predict and mitigate the environmental effects of the development. It is limited in scope to environmental effects, and the social and economic impacts associated with the environmental effects.

The COSDI Report recommends that this traditional environmental assessment process be expanded to include all the components of sustainable development, including environmental, social, health, cultural, economic and cumulative impacts. It suggests as well that the review include an assessment of the sustainability of the proposed development. (Recommendation 4B)

The following amendments to *The Environment Act* are required to implement these recommendations:

- Expand the environmental assessment process to an "effects assessment" to include the assessment and review of any combination of the following elements:
  - purpose of the project;
  - description of the project;
  - assessment methodology and results of public consultation;
  - analysis of alternatives to the project, and alternative means for the project, including the "do nothing" option;
  - need (in connection with alternatives);
  - description of existing environment and potential zones of impact;
  - description of environmental effects;

- description of the social effects, including human health, cultural and heritage values;
- description of the economic effects;
- description of the mitigation measures;
- description of cumulative and interdependent effects;
- residual effects and their significance;
- follow-up plans;
- decommissioning; and
- project sustainability.

Issues

- Who will decide which of the listed elements will be included in the effects assessment? Are there any of the elements that would always be included? Which would be discretionary? Should there be an appeal mechanism for the decision re: the elements to be assessed?
- Without some criteria to apply, it could be perceived that decisions on the elements to include were being arbitrarily made. This could give rise to public criticism of the process. Should this decision be based on some set criteria or guidelines? If so, how should these guidelines be developed? What should be some of the criteria? What should be the role of the public?
- Consideration should be given to allowing input from stakeholders at the front end of the process. Public notice could be given that an effects assessment will be carried out and ask for public input on what elements should be included.
- As assessments will be reviewed by the Environmental Approvals Branch, is it is reasonable that the director should finally decide what elements are included?
- Proponents will want to know very early in the process how extensive their effects assessment will be.
- Do any of the elements require further elaboration or clarification? E.g. "project sustainability"; "social effects"; "residual effects."

- Amend the Public Hearing Section to strengthen the public participation process
  - Provide capability for the Clean Environment Commission (CEC) to investigate the technical aspects of proposals in advance of hearings so they understand the proposal and the associated issues. (Recommendation 5K, L (b))
  - Provide clear terms of reference to the CEC with respect to the issues to be addressed. (Recommendation 5L (a))
  - Set out qualifications for appointment to the CEC. (Recommendation 5L (d))

Issues

- Criteria could be developed as to what projects should be referred to the CEC. What would be some of the criteria?
- If the CEC undertakes consultations and does not resolve the issue, can it still call/hold hearings?
- COSDI calls for the CEC to be able to investigate the technical aspects of proposals prior to hearings. Should the process be one of a literature review with contact with the proponents kept to a minimum (or not at all) so that there would be no public perception that the proponent was swaying the CEC in advance of the hearing?
- The COSDI report calls for the act to include qualifications for the CEC members. It sets out some of the qualifications. Should there be others?

- Amend the staged licencing process to make it contingent on a determination that environmental impacts of the project as a whole are insignificant or can be mitigated with known technology. (Recommendation 4 I)

Issues

- Who would determine whether a proposal warranted staged licencing? How would this determination be made? Who would have the authority to make it? What would be the extent of the assessment required? Who would be involved e.g. the public? Is there an objective test for overall acceptability of the development? Should there be an appeal mechanism at this stage?

- Provide for the capability to coordinate multiple review processes; e.g. use of "case worker", consolidated hearings and combined information gathering. (Recommendation 4 M)

Issues

- What review processes would be included? What would be the authority of the "caseworker"? What hearings could be combined? Would they be integrated, or just combined/coordinated? Who would make the call? Any process requirements?

- Provide for the capability to scope issues in the assessment process, including the ability to recognize the effective resolution of specific issues in the pre-licencing or planning stage. The determination of the successful resolution of the issues would be undertaken through the initial scoping component of the effects assessment. Issues determined to have been successfully resolved would not need to be addressed again in the effects assessment process. This concept will require criteria for the determination of successful issue resolution and the establishment of a mechanism for "crediting" the resolved issues. (Recommendations 4 D,E&F)

Issues

- Who would be involved in the early consultations? How and when would sign-off be achieved? How can we ensure good faith discussions at the front end – on both sides?
- How would the "crediting" be done?
- How would we ensure all the interests were at the table at the outset? How would we deal with latecomers?
- Should participant funding be included at this stage?

- Enshrine the technical advisory committee (TAC) in the legislation, with its terms of reference; and provide public access to the members of the TAC. (Recommendation 5 N,O&P)

Issues

- Would the TAC be opened, or would the work of the TAC be accessible (minutes, reports)?
- How much detail needs to be included in the legislation? Any terms of reference?
- How do we maximize information availability and protect the staff where their views may not conform with the government/department views? Can we separate fact from opinion?

- Establish a process of "category reviews" for developments of a similar nature. Specify the types of developments; outline the process requirements; public notice and input requirements (for both the development of the template and the specific reviews). (Recommendation 4 P)

Issues

- What types of developments would be eligible for category reviews?
- What standard process requirements would apply?
- What would be the level of public involvement, both with respect to creating the category review process and running individual reviews?

- Establish a mechanism for ensuring the objectivity of the consultant doing effects assessment; e.g. separate consultants for design and environmental assessment. (Recommendation 5 G)

Issues

- How can this be effected in the collaborative processes where it might make sense for the consultant to work through the complete process, because there is no split between the design and review processes?

- Require the proposal to be consistent with the large area/ municipal/ district plans as a prerequisite to licencing. (Recommendation 4 J&K)

Issues

- At what stage is this determination made, and by whom?
- What if there are inconsistencies?

2. Public Participation

Currently there is inconsistent opportunity for public input into environmental assessment, resource allocation, and land-use planing. In order to rectify the situation and to ensure optimum opportunities, the following amendments to *The Environment Act* are required. Consistent provisions will be required in resource and planning legislation.

- Clarify the participant assistant provisions of the act with respect to conditions for use, who pays, possible funding caps, relationship to planning and resource allocation activities. (Recommendation 5 Q&R)
- Expand the capability of the public registry to accommodate planning and resource allocation information. (Recommendation 5 M a)
- Provide the public registry with capability for housing electronic information. Recommendation 5 M f)
- Provide for local and regional registries and federal provincial registries. (Recommendation 5 M c)
- Provide notice and opportunity for comment with respect to proposed alterations, and notice of decisions. (Recommendation 4 O)

3. Other COSDI Recommendations

- Amend Section 16 to provide for ministerial discretion to address problem situations not included in the Classes of Development Regulation. (Recommendation 4Q)

  This amendment is to correct a wording problem in *The Environment Act*. It was originally intended that the minister would be able to require a development that was not on the classes of development list to be licenced under the act, where there was concern re the environmental impacts. When efforts were made to implement this section, a court challenge found in favour of the company, because of the wording of the section.

B) Amendments reflecting new ideas in implementing sustainable development

In light of the COSDI recommendations and the philosophy that produced them there are other proposals from Manitoba Conservation, separate from the COSDI process, for Environment Act amendments that will assist in the orderly implementation of sustainable development.

- Repeal the reference to "classes of development" such that there is no process distinction between the development types. Where effects assessment is applied, it will be consistent through the various development types, with the director making the decision, appealable to the minister. There will need to be an ancillary amendment to MR164/88, the Classes of Development Regulation.

- Provide the CEC with greater flexibility. Establish the CEC as experts in public consultation and refer proposals to them for consultation, allowing them to choose the most appropriate forum, whether it be mediation, meetings, negotiations or hearings.

Issues

- Will this new role affect the qualifications for commissioners?
- Are there any conditions where the department would issue specific instructions to the CEC re: how to handle a consultation, e.g. hearings, mediation, etc.?
- Should there be limitations on how much of this work the CEC can farm out to consultants, as opposed to doing the work in-house?
- Where the CEC undertakes consultation or dispute resolution and is unsuccessful in resolving the issue, should it then hold hearings? If so, should there be a requirement that the hearing panel be made up of members not involved in the earlier efforts?

- COSDI recommended that there be the capability for proponents, the regulator and stakeholders to come together in advance of the formal licensing process to try and identify and resolve issues before the process began. This envisaged a system whereby all the parties would have input into identifying the issues and concerns and providing the terms of reference for the consultants. In this case there should be a greater level of trust in the work of the consultant and less contention as the process unfolded. There may be some cases where the discussions are particularly successful and trust and collaboration are established. In these cases, it would be good to have an option to the licencing process whereby the proponent, stakeholders and government could continue the discussions to a point where the details of the proposal are developed and agreed to by the parties. The agreement could be formalized into a contract with respect to the design, construction and operation of the proposed development. The contract could be declared to be an environmental licence under the act, to provide enforcement capability, but would be the result of a collaborative, rather than licencing process. At any point in the process, if the discussions broke down, the process would default to the effects assessment process, resulting, ultimately in the issuing, or not, of a licence. The process would be consistent with a "pollution prevention" approach, that is, there would be increased opportunity for creativity and innovation, rather than the traditional issuing of a licence drafted by government

regulators. The process would necessarily be transparent, would include information requirements similar to effects assessment, and provide opportunity for dispute resolution as issues were addressed. (See Figure 1)

Issues

- Who would make the determination as to whether the negotiation process would be undertaken? When? With whose input?
- How could we build in "off ramps" so the process can default to "effects assessment" if the negotiation process unravels? Who would make that determination?
- How can it be structured so that a default does not drive the process back to the beginning, but that it essentially picks up the information already gathered?
- How do we determine who has status at the negotiating table. How do we ensure "good faith" negotiating?
- How do we prevent the system from being abused such that a party would participate in the process all along, only to oppose it through another route it at the end?
- How do we ensure sufficient public involvement to ensure there is no perception of "sweetheart deals" between the government and the proponent?

C) Amendments required to improve the effective administration of the act

Manitoba Conservation has identified some amendments required to ensure the administration of the act. This category of amendments includes the following:

- Repeal Sections 48 to 53, dealing with abatement projects. These provisions were designed to deal with situations that have arisen when a town grew around an industry such as a feedlot, which then became a concern because it was now located in the center of a town. The act provided for assistance in moving the industry to a location outside of the town. The provisions have seldom been used to resolve the problems the sections were designed to address.

- Amend provisions relating to "alterations" to developments, by allowing the director to initiate a process to open-up a licence where significant adverse environmental effects might occur with continued operation of the development as licensed. There is currently no provision for the department to resolve significant environmental problems resulting from a development that is complying with its licence. This will allow for a process to alter the licence to rectify the situation.

- Amend section 24, relating to emergency orders, by: (i) lowering the thresholds that must be met before an order may be issued; (ii) repealing subsections (5), (6) and (9) requiring a court order prior to taking further

steps where the original order has not been complied with; and (iii) simplifying the method by which the director may cause the necessary work to be done, and recover costs, where the original order is not complied with. The existing capability to deal with emergency situations is constrained by the current wording of the act.

- Add new provisions dealing with "review clauses", to ensure that clauses can lawfully be included in a licence to require a periodic review of the licence requirements, and describing their legal effect. There is currently no overt capability to include the requirement to review a licence in a given timeframe to determine its performance in protecting the environment.

- Further minor amendments to a) make single, the requirement for advertising; b) amending the definition of "alter" to make it consistent with the rest of the act; and deleting sub-section 13(2) related to licencing preliminary steps.